No. 3318.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and Librado Rivera,

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

ANSWERING BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF CASE.

The plaintiffs in error are self-announced anarchists. Magon had been connected with the publication of "Regeneracion," an anarchist newspaper, for some years. This paper, because of its character, had been denied the use of the United States mails. The article called "Manifesto" upon which the indictment is based

was signed by both defendants. Defendant Magon owned the printing office and press where the paper was printed. Rivera, when arrested, had upon his person three copies of the paper containing the "Manifesto" which were separately wrapped, the wrapper duly addressed and postage stamps attached ready for mailing. Many of the papers were deposited in the mails at the postoffice, all duly stamped and addressed. Two of them were addressed to men upon the U. S. Ship McCollough, then a portion of the naval forces of the United States. Some were addressed to persons in the Philippine Islands. The papers were also placed on sale at news stands in the city of Los Angeles. All the matters charged in the indictment arose out of the writing, printing, publishing, mailing and circulating of the article called "Manifesto" which defendants published in the paper "Regeneracion" dated March 16th, 1918.

The assignments of error which are discussed in plaintiffs' brief are:

I. That the indictment does not state an offense against the United States.

See Trans. p. 62, Assmts. 1 to 5, inclusive.

II. That the indictment is duplicitous.

See Trans. p. 62, Assmt. 6.

III. That the admission of a speech made by Magon and printed in a prior edition of the same newspaper was error.

See Trans. p. 64, Assmt. 8.

IV. That the reading to the jury of a letter from Emma Goldman published in the issue of March 16, the same in which the "Manifesto" appeared, was error.

See Trans. p. 65, Assmt. 9.

Upon these assignments the reversal is asked. This waives all other assignments.

I.

It is claimed in plaintiffs' brief, page 7, "that the facts stated in each of the five counts of the indictment upon which they (the defendants) were tried, do not constitute an offense against the United States."

No authority is cited for the alleged reason that "no precedents exactly in point are obtainable."

We believe such authority is at hand, and we cite the following:

Goldman v. U. S., 245 U. S. 474, 476;

Schenck v. U. S., decided Mar. 3, 1919;

Baer v. U. S., decided Mar. 3, 1919, No. 10 U. S. S. C. Advance Opinions p. 289;

Frohwerk v. U. S., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions p. 306;

Debs v. U. S., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions p. 309;

Shaffer v. U. S., No. 3220 in Ninth Circuit, Judge Gilbert writing opinion;

Bulletin No. 190, Interpretation War Statutes;

Magon v. U. S., 248 Fed. 201.

See:

Jelke v. U. S., 255 Fed. 264, 274, *et seq.*

II.

The indictment is not duplicitous.

a. The first count charges a conspiracy to violate Sec. 3 of Title I, and Sec. 3 of Title XII, of the Espionage Act, and Sec. 19 of the Trading with the Enemy Act, and Sec. 211 of the Penal Code.

This charges but one offense,—that of conspiracy, being a violation of section 37, Penal Code.

Duplicity consists in stating two or more offenses in the same count of the indictment.

22 Cyc. p. 376;
12 Stand. Ency. Proc. p. 499, XI, Note (b), p. 500;
U. S. v. Morse, 161 Fed. 429, 437;
Allison v. U. S., 216 Fed. 326, 329;
Lewellen v. U. S., 223 Fed. 18, 20.

Where a count of an indictment charges a conspiracy to violate more than one penal law of the United States it is not therefore duplicitous, the charge being that of conspiracy. To make such a count duplicitous it must charge two distinct conspiracies.

In

Frohwerk v. U. S., decided Mar. 10, 1919, No. 10 U. S. Supreme Court Advance Opinions, April 1, 1919, pp. 306, 308,

Justice Holmes, writing the opinion of the court, says:

> "Countenance, we believe, has been given by some courts to the notion that a single count in an indictment for conspiracy to commit two offenses is bad for duplicity. This court has

given it none. Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., 248 U. S. 55, 60, 61 [ante 57-59, 39 Sup. Ct. Rep. 38]; Joplin Mercantile Co. v. United States, 236 U. S. 531, 548, 59 L. Ed. 705, 712, 35 Sup. Ct. Rep. 291. The conspiracy is the crime, and that is one, however diverse its objects."

See:

U. S. v. Rabinovich, 238 U. S. 78, 86;
Shepard v. U. S., 236 Fed. 73, 81;
U. S. v. Rogers, 226 Fed. 512, 515.

A demurrer was sustained to the second count.

The third count charges a violation of Sec. 3, Title I, of the Espionage Act. It is not duplicitous.

The fourth count charges a violation of Sec. 3, Title XII, of the Espionage Act. It is not duplicitous.

The fifth count charges a violation of Sec. 19 of the Trading with the Enemy Act. It is not duplicitous.

The sixth count charges a violation of Sec. 211 of the Federal Penal Code. It is single and not duplicitous.

b. It seems that the argument of plaintiffs is addressed rather to misjoinder than to duplicity.

It is well, perhaps, to direct the attention of the court to the fact that the demurrer was sustained to the second count of the indictment which charges that defendants did "make and convey false statements and reports with intent," &c., because the court held that the article did not contain such "false statements and reports," but expressions of opinion and argument. The claim of plaintiffs that the allegations of the in-

dictment are confined to false reports and false statements (Brief p. 7) is not justified. The case was not tried upon that theory, but such theory was expressly eliminated.

It is charged in the first count of the indictment [Trans. p. 6] that defendants conspired to write and publish "an article containing false reports and false statements which would tend to interfere with the operation and success," &c. It was insisted at the trial that this meant that the false reports and statements, only, would tend to interfere; but the court held that "which" referred to the "article" and not to the "false reports and false statements."

As to the remaining counts of the indictment—third, fourth, fifth and sixth—the question does not arise as there is no allegation in either of falsity.

Section 1024 of the U. S. Revised Statutes reads as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together * * *, instead of having several indictments the whole may be joined in one indictment in separate counts; * * *."

This statute controls the practice in United States Courts.

Sidebotham v. U. S., 253 Fed. 417, 418 (Ninth Circuit);

McNeil v. U. S., 246 Fed. 827;

Orth v. U. S., 252 Fed. 566, 568;

Glass v. U. S., 222 Fed. 773, 780 (Ninth Circuit);
Dillard v. U. S., 141 Fed. 303, 304 (Ninth Circuit);
Logan v. U. S., 144 U. S. 263, 295;
Pointer v. U. S., 151 U. S. 396, 400;
Ingraham v. U. S., 155 U. S. 434, 436;
Williams v. U. S., 168 U. S. 382, 390;
Morgan v. Devine, 237 U. S. 632, 640;
U. S. v. Howell, 65 Fed. 407.

The cases cited by counsel in brief, pages 10 and 11, do not sustain his contention.

Stevens v. M'Claughry, 207 Fed. 18, was a *habeas corpus,* and holds that on conviction of offenses stated in separate counts growing out of the same facts but one punishment may be adjudged.

Munson v. M'Claughry, 198 Fed. 72, was a *habeas corpus,* and holds that where one is convicted on two counts of an indictment charging violation of different statutes by the same act but one punishment may be adjudged.

In Logan v. U. S., 123 Fed. 291, one count of the indictment charged forgery of National Bank notes and another count charged forgery of the signatures to said notes. This was held to be one offense. But the same case holds that defendants could be convicted of the forgery and of having each of the forged notes in possession with intent to pass.

In U. S. v. Miner, 26 Fed. Cas. No. 15,780, two counterfeit plates were held in possession by defend-

ant, the plates being connected together, and defendant was acquitted as to one plate and the court advised the district attorney that, as there was but one possession, the second indictment ought to be dismissed, and this was done.

These are all the Federal cases cited by plaintiffs' brief on this point.

In Gavieres v. U. S., 220 U. S. 338, it was held that there was not double jeopardy where defendant was convicted and punished for 1, drunkenness and rude boisterous language, and 2, under another ordinance for insulting a public officer, the insult being the result of the use of the boisterous language aforesaid.

In Carter v. McClaughry, 183 U. S. 367, 395, the court said:

> "The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

In Burton v. U. S., 202 U. S. 344, 381, in speaking of the plea of *autrefois acquit,* the court said:

> "It must appear that the offense charged, using the words of Chief Justice Shaw, *'was the same in law and in fact.* The plea will be vicious *if the offenses charged in the two indictments be per-*

fectly distinct in point of law, however nearly they may be connected in fact."

In Ebeling v. Morgan, 237 U. S. 625, 628, the question was whether one who, at the same time and place, cut mail bags of the United States with intent to rob or steal the mail therein was properly sentenced to serve sentences for each bag cut, charged in separate counts, such sentences to run consecutively. It was held that such sentences were proper.

In the case at bar the first, or conspiracy, count could be made by showing some overt act done to effect a proven conspiracy; the third count could not be made on the same evidence as the first; the fourth count includes an element not in the first or third; the fifth count includes elements not in the first, third or fourth; and the sixth count includes elements not in either of the others. Each count would require some fact to be proven not necessary to any other. Hence the indictment does not "split up" an offense, and the court would have been justified in making the sentences consecutive.

The sentences to imprisonment, however, are made to run concurrently and payment of a single fine liquidates all; and the punishment adjudged is no more than could have been adjudged on the third count of the indictment. [Trans. pp. 29-31.]

Hence the plaintiffs in error have not been prejudiced, either by the trial upon the several counts, or by the conviction upon all of them, or by the passing of sentence upon all.

III and IV.

The remaining points of plaintiffs' brief deal with the admission in evidence

First, Of a speech made by defendant Magon on May 27, 1917, after war was declared, and published in the "Regeneracion" of July 28, 1917; and

Second, Of the reading in evidence of a purported letter of Emma Goldman which was printed in the same paper which they distributed, of date March 16, 1918.

First, The speech made by Magon was admissible to show the intent with which he produced and published the manifesto.

Second, The letter of Emma Goldman was admissible to show intent of both Magon and Rivera, the evidence showing Magon printed the paper and Rivera was helping to mail it, if nothing more.

Debs v. U. S., 248 U. S. ..., decided Mar. 10, 1919, No. 10 U. S. S. C. Advance Opinions 309, 311;

I Wigmore on Ev. §367, p. 445;

Higgins v. State, 157 Ind. 57;

Republica v. Weidle, 2 Dallas (2 U. S.) 88;

Reg. v. Hunt, 1 State Trials (N. S.) 171;

Reg. v. O'Brien, 7 State Trials (N. S.) 1, 75;

Fries Case, 9 Fed. Cas. No. 5126, pp. 909, 914;

U. S. v. Burr, 25 Fed. Cas. No. 14,694;

U. S. v. Pryor, 27 Fed. Cas. No. 16,096;

Reg. v. Deasy, 15 Cox's Crim. Cas. 334;

Reg. v. Frost, 9 Car. & P. 129, 38 E. C. L. 70.

Conclusion.

Plaintiffs in error were shown to be anarchists. They also admitted it. As such they were seeking the overthrow of all governments and especially of the United States Government. It was claimed in argument that their anarchy was of a benign and salubrious character. One must then believe that when Magon said

"Above your caprice is our right, right which we do not owe to you, but to nature which has endowed us with a mind to think, and in the defense of a right, understand it well, we are ready for anything and to face it all, be it the dungeon or the gallows. Don't forget that right, no matter how much you may mutilate it, no matter how much you may crush it, no matter how much you may try to annihilate it, when it is persecuted the most, and when you are proudest of your triumph, it roars its vengeance in dynamite, belches lead from the barricade" [Trans. p. 47],

this was a mere assurance to the ignorant Mexicans to whom he was speaking and to whom the paper containing this speech was circulated, of the overpowering love for all mankind that permeated his breast and that should actuate them in their conduct to the people and country which was protecting and feeding them. That the breathings of revolution, slaughter and death of the "Manifesto" are merely figurative adjurations to loyalty and patriotism. That the circulation of Emma Goldman's letter glorifying and urging the spread of the spirit of the Bolshiviki

was only to allay excitement of the "radicals" and make them the more readily submit to the Selective Service Act. This is beyond all belief.

There is no doubt of the guilty intent of these appellants, nor of their guilty acts to effectuate that intent. Magon is now serving time for a like offense and this court approved the sentence in Magon v. U. S., 248 Fed. 201. There is no prejudicial error in the record and the judgment should be sustained.

Respectfully submitted,

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